

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

3 UNITED STATES OF AMERICA) Docket No. A 09-CR-193(1) SS
4)
4 vs.) Austin, Texas
5)
5 HUMBERTO FERNANDEZ) October 9, 2009

6
7 TRANSCRIPT OF SENTENCING
8 BEFORE THE HONORABLE SAM SPARKS

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25 Proceedings recorded by computerized stenography, transcript
produced by computer.

13:36:13 1 THE COURT: 09-CR-193, United States vs. Humberto
13:36:16 2 Fernandez.

13:36:17 3 MR. SPARKS: Grant Sparks for the United States, your
13:36:19 4 Honor.

13:36:19 5 MR. BOYD: Kevin Boyd for Mr. Fernandez, your Honor.

13:36:23 6 THE COURT: Mr. Fernandez here?

13:36:27 7 MR. BOYD: Yes, sir.

13:36:38 8 THE COURT: Your name, sir?

13:36:39 9 THE DEFENDANT: Humberto Fernandez.

13:36:40 10 THE COURT: Mr. Fernandez, have you had the opportunity
13:36:42 11 to review with Mr. Boyd the presentence investigation made in
13:36:45 12 your case?

13:36:45 13 THE DEFENDANT: Yes, sir.

13:36:47 14 THE COURT: The United States Probation Department has
13:36:53 15 determined an offense level adjusted of 19, with a criminal
13:36:59 16 history of I, for a guideline range of 30 to 37 months.

13:37:07 17 I have no objections by the government. One objection
13:37:17 18 by the defense. And I have a notation of a variance possibility
13:37:27 19 under 18 United States Code 3553(a).

13:37:33 20 MR. BOYD: And, your Honor, in regard to the objection,
13:37:35 21 I think, also -- your Honor, do you have a 5K2 motion filed in
13:37:39 22 this?

13:37:40 23 THE COURT: No. I do not.

13:37:44 24 MR. SPARKS: You should, your Honor. You're not
13:37:47 25 showing one in your file?

13:37:49 1 THE COURT: No. There's been no 5K motion filed that I
13:37:52 2 have received. Now, whether you filed it or not, I do not know.

13:37:56 3 MR. SPARKS: I'll see about that because --

13:37:59 4 THE COURT: Well, let's see about it right now on the
13:38:01 5 screen. I have a lot of 5K motions filed in this case.

13:38:54 6 THE CLERK: When was it filed?

13:38:57 7 MR. BOYD: Two weeks ago.

13:38:58 8 MR. SPARKS: May we approach, your Honor?

13:38:59 9 THE COURT: You may approach.

13:39:04 10 (At the bench, off the record.)

13:41:40 11 MR. SPARKS: Judge, I don't have the hard copy with me
13:41:42 12 right now, present.

13:41:43 13 THE COURT: Okay. So we don't have a file copy, don't
13:41:46 14 have a -- do you have a copy?

13:41:48 15 MR. BOYD: No, Judge. I do not.

13:41:50 16 THE COURT: All right. I'll recall Mr. Fernandez's
13:41:54 17 case when you get me a copy.

13:41:55 18 MR. SPARKS: Yes, your Honor.

13:41:55 19 * * *

14:24:03 20 THE COURT: Humberto Fernandez.

14:24:14 21 MR. SPARKS: Grant Sparks for the United States.

14:24:17 22 MR. BOYD: Kevin Boyd for the United States.

14:24:18 23 THE COURT: Do we have a copy yet?

14:24:20 24 MR. SPARKS: Yes, your Honor.

14:25:03 25 THE COURT: Okay. Well, Mr. Fernandez, I think you've

14:25:11 1 given me your name. And I think we have covered the fact that
14:25:14 2 you've reviewed the presentence investigation. And now I have
14:25:19 3 received a 5K motion, which has requested that I knock your level
14:25:28 4 down from 19 to 17. Seventeen to I would be 24 to 30 months.

14:25:56 5 I have one objection and that is the aggravated role.
14:26:03 6 You really want that objection?

14:26:05 7 MR. BOYD: No, your Honor.

14:26:05 8 THE COURT: I didn't think so.

14:26:07 9 MR. BOYD: Your Honor, I was just -- at the time I
14:26:09 10 didn't know --

14:26:09 11 THE COURT: You're just doing your lawyering. I'm not
14:26:12 12 complaining about it or criticizing it, but you have just as much
14:26:17 13 opportunity of getting that sustained as jumping flatfooted over
14:26:21 14 this building.

14:26:22 15 MR. BOYD: I assumed that, your Honor.

14:26:26 16 THE COURT: Well, Mr. Fernandez, I don't mean to preach
14:26:28 17 at you, but I hope you just saw you ruined five families.

14:26:34 18 THE DEFENDANT: Yes, your Honor. I'm very sorry.

14:26:37 19 THE COURT: And only God knows what damage the guns
14:26:41 20 that went to Mexico did.

14:26:44 21 THE DEFENDANT: Your Honor, they are all registered
14:26:46 22 with people that are in hunting clubs, and they're not for
14:26:50 23 illegal purposes.

14:26:52 24 THE COURT: I'll never know that. And I know from
14:26:58 25 experience of sitting here 18 years that guns go to different

14:27:03 1 people, even in this country, but they sure go to different
14:27:06 2 people in Mexico.

14:27:10 3 But in any event, before I decide what to do with you
14:27:14 4 and before I decide whether I'm going to grant this motion, I'll
14:27:18 5 be glad to listen to anything you'd like to say.

14:27:21 6 THE DEFENDANT: Yes, your Honor.

14:27:23 7 I want to first thank the Court for giving me a chance
14:27:26 8 to put myself -- to come up to court and, also, to apologize to
14:27:35 9 U.S. and the Court and all the people's families they're not here
14:27:39 10 anymore and, also, to my family. And I have never done anything
14:27:47 11 like this before in my life, and I promise I'll never do anything
14:27:52 12 like this again.

14:27:57 13 MR. BOYD: Your Honor, I talked to Humberto, and I
14:28:01 14 understood how the Court was going to feel. And we talked at
14:28:04 15 length about what he's done to these other people and
14:28:09 16 friendships. Your Honor, I have personal experience with these
14:28:11 17 hunting clubs in Mexico and I just want -- I know the guns can
14:28:14 18 end up anywhere, your Honor, but the guns were not used for
14:28:17 19 illegal purposes, not the type of guns that those people that
14:28:21 20 used. They were bought for his friends. I'm very familiar with
14:28:25 21 the laws in Mexico. They were legally registered before they
14:28:29 22 left. That's why their boxes were still found in the warehouse.
14:28:35 23 Each ranch -- they go to Mexico to buy a gun, you have to go to
14:28:39 24 Mexico City. So it's so convenient for Mexican citizens to ask
14:28:43 25 someone to do what he did, which is totally wrong.

14:28:46 1 He totally debriefed with the government. Told the
14:28:49 2 government where he knows in south Texas where guns of AR-15s and
14:28:54 3 AR-7s are being sold. He was upfront. He was the first one, I
14:28:57 4 believe, debriefed. Maybe Ms. Banda. He told them where other
14:29:01 5 people were doing this, and he's tried to do everything he can to
14:29:06 6 rectify it. And his parents -- his father's here and his two
14:29:08 7 brothers are here, are very upstanding businesspeople in
14:29:10 8 Monterrey, and they can't tell you how bad they feel for the
14:29:13 9 families that were here today.

14:29:17 10 THE COURT: Mr. Sparks.

14:29:19 11 MR. SPARKS: Just a couple of things.

14:29:23 12 Paragraph 13 of the presentence investigation report
14:29:25 13 reflected that one of Mr. Fernandez's firearms he purchased back
14:29:31 14 in the late '90s ended up being traced to a crime committed in
14:29:35 15 Mexico. So that underscores the Court's point somewhat. So that
14:29:40 16 highlights the fact that it may not have been his first time
14:29:43 17 involved in that sort of thing. Ultimately --

14:29:44 18 THE COURT: If things are going to be registered and
14:29:47 19 registered properly, the gun packaging wouldn't be here.

14:29:53 20 MR. BOYD: Your Honor, I was involved in a hunting
14:29:56 21 ranch in Mexico, and when the guns were registered here when you
14:30:01 22 take them across, you leave the packaging because if it's in the
14:30:03 23 package, the Mexican government wonders, well, why is it
14:30:06 24 registered if it's in the package. I know, your Honor --

14:30:10 25 THE COURT: You can take an elephant across the border,

14:30:14 1 and the immigration and the customs may not catch it. I
14:30:17 2 understand that. I don't believe I've -- other than law
14:30:24 3 enforcement and they just get checked, I don't believe I've ever
14:30:28 4 seen anybody try to take a gun across the border.

14:30:32 5 MR. BOYD: Judge, I did. Last year, I got a permit and
14:30:34 6 it cost me \$340 --

14:30:36 7 THE COURT: But that was a hunting rifle.

14:30:38 8 MR. BOYD: Yes. And all these were hunting rifles,
14:30:40 9 your Honor. I'm not trying to mitigate at all. I just want the
14:30:42 10 Court to know that he wasn't using these for the purpose of
14:30:45 11 causing havoc with the cartels or anyone else.

14:30:50 12 MR. SPARKS: Judge, the only thing I can add here is
14:30:54 13 exporting those -- any amount of firearms, there are several
14:31:00 14 other charges that he could have been charged with, based on his
14:31:05 15 admission. And even selling a gun from one state to another is
14:31:09 16 illegal and certainly from one country to another. So to argue
14:31:11 17 that somehow it's --

14:31:12 18 THE COURT: It's just possession of a gun.

14:31:15 19 MR. SPARKS: Agree, your Honor. So that argument
14:31:17 20 doesn't hold much weight. Mr. Fernandez is a terrific con man.
14:31:21 21 The guns that we know, there were 21 gun boxes in the storage
14:31:25 22 facility, 37 can be attributed to him. He says he's ruined five
14:31:30 23 lives, or the Court may have said that, but there's still two
14:31:34 24 other individuals yet to be sentenced. One other individual made
14:31:39 25 a single purchase of multiple guns. One other individual in the

14:31:42 1 Southern District that may be prosecuted down there and then, one
14:31:45 2 other individual in the Minnesota area that we believe that Mr.
14:31:48 3 Fernandez is also responsible for, not to mention the fact that
14:31:52 4 somehow he involved, you know, Mr. Humberto Trevino, somebody
14:31:57 5 that's got a bit of a Harvard education. He's a terrific con
14:32:03 6 man. I think he's minimizing his role, even at this late date.

14:32:15 7 THE COURT: What is the basis of the 5K motion?

14:32:19 8 MR. SPARKS: He did and I apologize for -- it wasn't
14:32:24 9 filed, as the Court knows, and you may not have had an
14:32:26 10 opportunity to go through it too closely. But there are two
14:32:29 11 other codefendants that are set to be sentenced. I know one's
14:32:34 12 set to be sentenced on the 16th, next Friday, Mr. Juan Ortega
14:32:37 13 and. Then, there's Mr. Fabian Pulido, Ms. Pulido's husband. He
14:32:42 14 gave us information that was, in our view, helpful towards a
14:32:50 15 successful prosecution of those individuals. He did give a full
14:32:54 16 debrief regarding these three others, the gentleman in Minnesota,
14:33:01 17 gentleman in Houston and then, one other local gentleman that was
14:33:06 18 a one-time purchaser. That's the basis.

14:33:11 19 THE COURT: All right. Probation have anything they
14:33:13 20 wish to say?

14:33:14 21 PROBATION OFFICER: No, your Honor.

14:33:15 22 THE COURT: Anybody wish to speak at this sentencing?
14:33:21 23 Come forward, sir.

14:33:38 24 SPEAKER: I am Humberto's father. In addition to him,
14:33:44 25 I've got three other boys, three other sons. I live in Mexico,

14:33:49 1 in Monterrey, specifically. Monterrey, Mexico. I'm a
14:33:53 2 businessman. I feel I'm well known in my city. And you know,
14:34:00 3 I'm also well known socially. Never before in our family have we
14:34:07 4 been in a problem like this. This is the first case. Never
14:34:18 5 involved with anything violent, or drugs, or thefts.

14:34:32 6 I feel Humberto, because of how I know him, I feel he
14:34:36 7 is repentant of what he did. And I also feel that he has learned
14:34:45 8 a lesson as a result of this. I feel I regret that other people
14:34:57 9 ended up hurt. And I do believe that in justice of the United
14:35:11 10 States, and I do believe that whatever it is that he -- that he
14:35:15 11 gets will be fair. Thank you.

14:35:22 12 THE COURT: Thank you for coming, sir.

14:35:45 13 Okay. Mr. Boyd.

14:35:49 14 MR. BOYD: Yes, your Honor.

14:35:50 15 THE COURT: Mr. Fernandez, anything further?

14:35:52 16 MR. BOYD: Nothing, your Honor.

14:36:02 17 THE COURT: Well, Mr. Fernandez, you're going to have
14:36:07 18 to live with the responsibility of all of the people that you
14:36:09 19 hurt. The lady's got more problems, Ms. Banda, than anybody
14:36:19 20 ought to have --

14:36:20 21 THE DEFENDANT: Yes, your Honor.

14:36:20 22 THE COURT: -- with her kids. Health problems that are
14:36:25 23 not going to get any better. I see where she, I don't remember
14:36:33 24 now, I think got \$80? Eight-hundred, I can't remember now. She
14:36:40 25 was desperate for the money. Her husband wasn't working. They

14:36:45 1 needed medicine. Then you take the first lady that I -- I mean
14:36:51 2 she could be deported. I don't know if she will or not -- I
14:36:55 3 don't have any control over that -- and not be able to live with
14:36:59 4 her own children.

14:37:03 5 And as your father says, you're going to go to the
14:37:10 6 penitentiary for a while, then you'll get out, you can go home,
14:37:16 7 enjoy the rest of your life. None of these other people will
14:37:20 8 ever be able to enjoy their lives anywhere close to the way you
14:37:27 9 will be able to enjoy your life. Doesn't have anything to do
14:37:30 10 with the sentencing, it's just the way that life is. Life is
14:37:36 11 never fair. There's no such animal as fairness in life. Life
14:37:42 12 has all sorts of twists and bits.

14:37:45 13 As far as I'm concerned, and you were in the courtroom
14:37:49 14 where you saw the other group that had the guns, well, they were
14:37:52 15 sending them to Mexico. There's no doubt about that.

14:37:55 16 THE DEFENDANT: Yes, sir.

14:37:56 17 THE COURT: Well, they were protecting their drugs, but
14:38:01 18 they had more guns going to Mexico. I spent 27 years in El Paso
14:38:10 19 where people were getting killed on the streets in El Paso by
14:38:13 20 guns that went into Mexico. That's in the United States. I
14:38:18 21 can't believe how badly -- it's gotten so bad now that many of
14:38:24 22 the people I met in San Antonio are from Monterrey, moving to San
14:38:29 23 Antonio to live just to get out of -- well, not all of those are
14:38:34 24 your problems, but that's where you find yourself when you start
14:38:37 25 dealing with illegality. You, all of a sudden, are in another

14:38:43 1 area and you get bad results.

14:38:49 2 But you've got no early criminal history. You're very,
14:38:54 3 very lucky, you come from a well-to-do family. I don't know how
14:38:59 4 you got into this. I don't know what it is, but the government
14:39:04 5 has no evidence and I won't manufacture any by thinking about it.
14:39:11 6 As far as I'm concerned, as soon as I can get you to do your time
14:39:15 7 and go home, it will cost the American taxpayer less money.

14:39:20 8 I sentence you to 24 months in custody of the United
14:39:22 9 States Bureau of Prisons, followed by a three-year term of
14:39:28 10 supervised release. As I anticipate you'll be deported when
14:39:30 11 released by the penitentiary, I place the conditions of 18 United
14:39:35 12 States Code 3583 on that, and if you attempt to come into this
14:39:39 13 country illegally, or if you're found in this country illegally,
14:39:43 14 you'll have to serve those three years. You won't even go to
14:39:47 15 trial. The government will just put you in the penitentiary.
14:39:50 16 But you could be then charged with coming back over here
14:39:53 17 illegally. So before you think about that ever, think of the
14:39:57 18 consequences.

14:40:02 19 I'm going to fine you \$20,000 in this case and a \$100
14:40:11 20 mandatory assessment under the Victims of Crime Act. Because
14:40:22 21 you're deported, a fine must be paid before you're released from
14:40:27 22 the penitentiary.

14:40:28 23 MR. BOYD: Your Honor.

14:40:30 24 THE COURT: Yes, sir.

14:40:31 25 MR. BOYD: I always want to be honest with the Court.

14:40:35 1 I don't think Mr. -- this crime is not a deportable offense,
14:40:39 2 believe it or not. He'll probably have to serve his supervised
14:40:43 3 release here in the United States.

14:40:45 4 THE COURT: Well, that's a possibility. If it is, then
14:40:49 5 I'll provide alternately that he -- he's a legal resident?

14:41:01 6 MR. BOYD: Yes, your Honor.

14:41:02 7 THE COURT: Well, they can certainly revoke his
14:41:04 8 residency.

14:41:05 9 MR. BOYD: They could try, your Honor, but they're
14:41:08 10 probably not going to be successful.

14:41:11 11 THE COURT: They'd be successful if they're in this
14:41:13 12 court. But I'll let that for another day and another judge. But
14:41:24 13 I've got no information, do I, Ms. Ornelas, he doesn't have any
14:41:33 14 drug or alcohol problems?

14:41:34 15 PROBATION OFFICER: No, your Honor.

14:41:35 16 THE COURT: I'll waive any alcohol and drug testing and
14:41:38 17 counseling. And I place the standard terms of supervised release
14:41:44 18 in the event he serves any supervised release here. I do place
14:41:52 19 the special condition that he will provide any and all financial
14:41:58 20 information of any nature as requested by the United States
14:42:05 21 probation officer to ensure that he doesn't go back into the
14:42:09 22 illegal selling of products in Mexico and to assist him in paying
14:42:18 23 the fine if he hadn't paid it by the time he gets out.

14:42:28 24 Until the fine is paid, he will not incur any
14:42:33 25 additional lines of credit, and he'll make full disclosure of any

14:42:38 1 and all assets, as well as income. And before trading, selling
14:42:45 2 or giving away those assets, he'll have to advise the United
14:42:49 3 States probation officer.

14:42:50 4 Anything further, Ms. Ornelas, I should think about?

14:42:54 5 PROBATION OFFICER: I think you said the \$100 special
14:42:58 6 assessment?

14:42:58 7 THE COURT: No. I haven't gotten to that.

14:43:01 8 PROBATION OFFICER: Okay. That's it, your Honor.

14:43:02 9 THE COURT: There will be a three-year term of
14:43:04 10 supervised release. Then I have a \$100 mandatory assessment
14:43:11 11 under the Victims of Crime Act that you must pay off.

14:43:18 12 I'm going to seal the presentence investigation.
14:43:22 13 Nobody could come in and read about you or your family, sir,
14:43:25 14 unless you authorize them to, and the government may use their
14:43:38 15 copies for official purposes. Any appeal, it becomes part of the
14:43:47 16 record. And I'm sentencing you to 24 because I am granting the
14:43:56 17 5K motion, filed by the government.

14:44:00 18 MR. BOYD: Your Honor, could I request some sort of
14:44:05 19 assignment in Texas so he can have visits from his father?

14:44:10 20 THE COURT: Yes. Where is the nearest place?

14:44:15 21 MR. BOYD: Of course, Bastrop, but I know how hard it
14:44:18 22 is to get there.

14:44:19 23 THE COURT: His father's from Monterrey. What about
14:44:21 24 south Texas?

14:44:22 25 MR. BOYD: The only facility I know is Three Rivers in

14:44:25 1 south Texas.

14:44:26 2 THE COURT: Well, there's not any closer than Bastrop.

14:44:29 3 MR. BOYD: No.

14:44:30 4 THE COURT: Well, it is closer but --

14:44:33 5 MR. BOYD: It's about an hour.

14:44:34 6 THE COURT: They come by air. They won't fly --

14:44:36 7 MR. BOYD: They drive, your Honor.

14:44:38 8 THE COURT: -- do they? Where do you want?

14:44:41 9 THE DEFENDANT: Bastrop.

14:44:42 10 THE COURT: All right. I have no problem. Because of
14:44:48 11 the guns, Mr. Fernandez, they may not assign you to Bastrop. Get
14:44:57 12 a counselor, explain your situation and where your family is and
14:45:04 13 where they will be coming from, and as soon as they evaluate you
14:45:08 14 that you're not a danger to anybody or danger to yourself,
14:45:12 15 they'll probably get you here pretty quick. But don't get riled
14:45:16 16 up if they send you to Minnesota. They're going to take one look
14:45:19 17 at these guns, and they're going to want to evaluate you before
14:45:23 18 they put you back into a population such as the one we have.
14:45:33 19 They might, just because I put it on a piece of paper, do it, but
14:45:36 20 normally a person with a history of firearm problems doesn't come
14:45:43 21 to Austin that quickly.

14:45:45 22 THE DEFENDANT: Yes, sir.

14:45:46 23 THE COURT: But they'll get you here as soon as they
14:45:49 24 can, as soon as they evaluate you, because they figure that you
14:45:52 25 will be a whole lot better off with family visitation than when

14:45:54 1 you're not.

14:45:55 2 THE DEFENDANT: Yes, sir.

14:45:56 3 THE COURT: Anything further?

14:45:57 4 MR. BOYD: No, your Honor.

14:45:58 5 It's just, I guess, a little work. He was incarcerated
14:46:01 6 for three-and-a-half months where he got out on bond. So I guess
14:46:03 7 that they'll count that time, won't they?

14:46:08 8 THE COURT: Yes. From the time that the feds took him.

14:46:10 9 MR. BOYD: And, your Honor, is there any -- since he
14:46:12 10 will self-surrender. He has a \$100,000 bond up. His father
14:46:16 11 requested I leave it up for a week to move his stuff out, and
14:46:20 12 when he self-surrenders, I'd request the bond money back if you'd
14:46:23 13 give him a week to surrender.

14:46:24 14 THE COURT: What about self-surrender?

14:46:27 15 MR. SPARKS: Judge, it's difficult for me because if he
14:46:32 16 self-deports prior to that, which I think he's got a great
14:46:37 17 incentive to do with a two-year sentence, that makes it less
14:46:40 18 likely that he'll ever retain permanent status. So I've been
14:46:47 19 advised by Pretrial that he has been in compliance with the
14:46:50 20 \$100,000 cash bond. I'm okay with self-surrender, your Honor,
14:46:56 21 the government's position.

14:46:57 22 THE COURT: Well, I think that's an intelligent thing.
14:47:02 23 Mr. Fernandez has already disappointed his family. He became a
14:47:09 24 fugitive from the United States, it would just be further
14:47:12 25 disappointing to his family. I'll take his father at his word.

14:47:17 1 His father's the one that put up the money.

14:47:23 2 MR. BOYD: Yes, your Honor.

14:47:23 3 THE COURT: With regard to the money, as soon as he is
14:47:25 4 incarcerated, you can file a motion. You need the United States
14:47:29 5 attorney's signature on it, and I'll be glad to sign it.

14:47:32 6 MR. BOYD: Thank you, your Honor.

14:47:34 7 THE COURT: All right. What else, if anything?

14:47:37 8 MR. BOYD: That's it from us.

14:47:38 9 MR. SPARKS: Nothing further from the government, your
14:47:40 10 Honor.

14:47:41 11 THE COURT: All right. Y'all may be excused. And I'm
14:47:43 12 in recess. You've got ten days in which to appeal. Here's
14:48:27 13 the --

14:48:28 14 MR. BOYD: There won't be an appeal, your Honor.

14:48:30 15 THE COURT: I understand that. But go over it with him
14:48:32 16 and make sure he knows that.

14:48:33 17 MR. BOYD: Thank you, your Honor.

14:48:34 18 THE COURT: Thanks.

19 (End of proceedings.)

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* * * * *

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Official Court Reporter, United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 21st day of June, 2010.

/s/Lily I. Reznik
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